

UNION VIOLENCE AND BARGAINING ORDERS: A NEW APPROACH TO *LAURA MODES*

Section 8(a)(5) of the National Labor Relations Act¹ declares an employer's refusal to bargain collectively with the majority representative of his employees to be an unfair labor practice.² The customary remedy applied by the National Labor Relations Board upon finding a section 8(a)(5) violation is the issuance of an order requiring the employer to bargain collectively with the aggrieved union.

Since the 1963 case of *Herbert Bernstein (Laura Modes Co.)*,³ an employer guilty of refusing to bargain has been able, at least in theory, to escape a bargaining order sanction by establishing that the union has engaged in serious violent misconduct.⁴ If successful, the *Laura Modes* defense⁵ relieves the employer of its duty to bargain until the union demonstrates majority support in an election supervised by the Board.

As a remedy for union violence, the *Laura Modes* doctrine has not fulfilled its promise. The Board has so restricted the range of factual situations that will make out a successful *Laura Modes* defense that bargaining orders have been withheld in only three⁶ of many cases in which the question has been directly confronted, and the Board regularly issues orders in favor of unions responsible for astounding patterns of misconduct.⁷ Despite the Board's cramped

¹ 29 U.S.C. § 158(a)(5) (1976).

² Section 8(a)(5) reads: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." *Id.*

³ 144 N.L.R.B. 1592 (1963).

⁴ D. McDOWELL & K. HUHN, *NLRB REMEDIES FOR UNFAIR LABOR PRACTICES* 194-98 (1976).

⁵ The use of the term "*Laura Modes* defense" requires some explanation. Strictly speaking, *Laura Modes* does not establish a defense to a § 8(a)(5) charge. In the *Laura Modes* situation, the employer is found guilty of an unfair labor practice in refusing to bargain, and other sanctions, such as reinstatement of unfair labor practice strikers with back pay, may result from that violation. The issue of union violence is relevant only to the question of the appropriateness of the bargaining order as a remedy. It is as a defense to the issuance of a bargaining order that the term "*Laura Modes* defense" is used in this Comment.

⁶ *Allou Distribs., Inc.*, 201 N.L.R.B. 47 (1973); *Joseph H. Bliss (Artcraft Mantel & Fireplace Co.)*, 174 N.L.R.B. 737 (1969); *Herbert Bernstein (Laura Modes Co.)*, 144 N.L.R.B. 1592 (1963).

⁷ Member Murphy's dissent in *Maywood Plant of Grede Plastics, Div. of Grede Foundries, Inc.*, 235 N.L.R.B. No. 40 (Mar. 24, 1978), [1978] NLRB Dec. 31,776, provides a graphic summary of union misconduct that the panel majority did not find sufficient to bar issuance of a bargaining order under *Laura Modes*:

Thus, for example, at the inception of the strike three union business agents blocked the path of employees attempting to enter the plant, push-

reading of *Laura Modes*, employers have raised the issue with increasing frequency in recent years.⁸

In a recent case in which the Court of Appeals for the Ninth Circuit enforced the Board's bargaining order,⁹ Judge Hufstedler, in dissent, criticized the Board for ignoring the coercive effects of union violence on the representational rights of employees.¹⁰ Her opin-

ing and jostling them. Others blocked the path of Personnel Manager Stokes as one among them, Business Agent Poe, shouted obscenities at him and threatened to "cut him up." Subsequently, Stokes was surrounded by a number of union representatives, including International Union President Elmer Lewis, and International Union Vice President Henry Harrison. On that occasion, Poe grabbed Stokes' neck with his hands from behind and someone grabbed Stokes' arms and held him. The group shouted obscenities at him, threatened him, and jostled him from side to side. Later that day, Poe—in the company of two other business agents—threatened "to cut" Stokes' groin after another had said that they "knew where Stokes lived and were going to get him." On the following day, another business agent struck Stokes in the back as police, who had meanwhile been called to the scene, attempted to force miscreants back to the street. Other business agents directed their activities toward "recalcitrant" employees. One business agent, Petetti, told employee Goldmeier to "get the hell out of here or I will rip your nose out of your face." The employee withdrew. Another business agent pushed a female employee, who was attempting to enter her car, so hard that her face struck the headrest and split her lip. Others dropped roofing nails onto the roadway while employees looked on. Still others broke the windows of automobiles attempting to enter the plant, while International Vice President Harrison, himself, threatened employees with damage to their cars if they did not stay at home. Harrison was present when another business agent pretended to place an explosive device on a car entering the plant. Business Agent Petetti opened the doors of a stopped vehicle and forcibly removed two of the employee passengers. He threw a brick which hit another vehicle being driven by a female employee. Another business agent sprayed an irritating substance into the car of one employee, causing the driver's nose to bleed and burning sensations in the throats and eyes of the passengers. Likewise, business agents disabled and damaged the cars of others attempting to enter the plant; indeed, they reached inside and pummelled those employees who did not appear to be otherwise intimidated. Others, in their own automobiles, pursued cars operated by nonstriking employees who were leaving the plant, occasionally bumping them, shooting at them with slingshots, attempting to force them into the path of oncoming traffic, or otherwise seeking to cause accidents.

Id., slip op. at 16-17, [1978] NLRB Dec. at 31,780-81.

⁸ See, e.g., *L'eggs Prods., Inc.*, 236 N.L.R.B. No. 43 (May 25, 1978), [1978] NLRB Dec. 32,270; *Maywood Plant of Grede Plastics, Div. of Grede Foundries, Inc.*, 235 N.L.R.B. No. 40 (Mar. 24, 1978), [1978] NLRB Dec. 31,776; *Bruce Duncan Co.*, 233 N.L.R.B. No. 176 (Dec. 15, 1977), [1978] NLRB Dec. 31,286; *Independent Ass'n of Steel Fabricators, Inc.*, 231 N.L.R.B. 264 (1977), *enforced in part*, 582 F.2d 135 (2d Cir. 1978); *John Dory Boat Works, Inc.*, 229 N.L.R.B. 844 (1977); *Great Chinese Am. Sewing Co.*, 227 N.L.R.B. 1670 (1977), *enforced*, 578 F.2d 251 (9th Cir. 1978); *Jimmy Dean Meat Co.*, 227 N.L.R.B. 1012 (1977).

⁹ *NLRB v. Triumph Curing Center*, 571 F.2d 462 (9th Cir. 1978).

¹⁰ *Id.* 478-80 (Hufstedler, J., concurring in part and dissenting in part).

The core section of the National Labor Relations Act guaranteeing employee rights is § 7, which reads, in relevant part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

ion, marking out the lines for a new approach to the *Laura Modes* defense, laid the groundwork for the expanded scope of *Laura Modes* proposed in this Comment.

Part I briefly explores the general background of the Board's policies with respect to the bargaining order remedy. A closer look at *Laura Modes* and other cases in which the Board has withheld bargaining orders occupies part II. In part III, this Comment analyzes the features on which the Board relies in rejecting *Laura Modes* defenses. Part IV describes how the Board's handling of *Laura Modes* contentions have fared in the courts of appeals, and part V, building from Judge Hufstедler's analysis, constructs a new approach to withholding bargaining orders because of union misconduct.

I. THE BARGAINING ORDER REMEDY

The *Laura Modes* cases, if they are to be fully understood, must be placed in the perspective of the Board's general policies concerning the issuance of bargaining orders. Roughly speaking, a bargaining order may be an appropriate remedy in two contexts: first, when an employer violates its duty to bargain with a union seeking initial recognition, and second, when an employer violates its duty to bargain with an incumbent union.

In the initial recognition context, the Board's policies are largely guided by two major Supreme Court decisions, *NLRB v. Gissel Packing Co.*¹¹ and *Linden Lumber Division, Summer & Co. v. NLRB*.¹² *Gissel* gave the Court's approval to the Board's trend in the mid-1960's away from its long-standing doctrine,¹³ under which an employer could not lawfully refuse to recognize and bargain with a card majority union unless it had a good faith doubt of the union's majority in an appropriate unit. Under this approach, the employer's independent violations of the Act had been treated as evidence of bad faith. Addressing the situation in which the employer's refusal to bargain is accompanied by independent unfair labor practices, the Court in *Gissel* eschewed the subjective good faith approach and measured the significance of the employer's additional

own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

29 U.S.C. § 157 (1976).

¹¹ 395 U.S. 575 (1969).

¹² 419 U.S. 301 (1974).

¹³ *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). See generally R. GORMAN, *LABOR LAW* 93-96 (1976).

unfair labor practices by the extent to which they undermined the union's support and rendered a free and valid representation election unlikely. Although the *Gissel* Court expressed a preference for Board-conducted elections and found authorization cards generally a less reliable indicator of employee desires, the Court nevertheless thought a card majority a sufficiently reliable basis for the issuance of a bargaining order when the employer's violations are so serious as to poison the election process.¹⁴ After *Gissel*, the severity of the employer's violations and their coercive impact on the employees are the determinative factors in deciding whether a bargaining order should issue.¹⁵

Linden Lumber resolved the question whether, in the absence of any independent employer unfair labor practices, an employer can be ordered to bargain with a union that demonstrates a valid card majority. Reiterating its preference for expeditious representation elections and its distaste for inquiries into the employer's state of mind in protracted unfair labor practice proceedings, the Court affirmed the Board's position of putting the burden on the union to petition for an election following the employer's refusal to accept a card showing.¹⁶

In the incumbent union context, the Board has adhered to a presumption of the union's continuing majority status, rebuttable only by the employer's good faith doubt supported by objective evidence. Consistency with the Supreme Court's opinions in *Gissel* and *Linden Lumber*, however, would require the Board to abandon the subjective good faith analysis and to disdain use of unfair labor

¹⁴ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

¹⁵ *Id.* 613-15. The Court appeared to approve the issuance of a bargaining order as a remedy for "outrageous" and "pervasive" employer unfair labor practices, even if the union has never been able to demonstrate a majority. The Board, however, has been reluctant to follow through on the Court's suggestion. See R. GORMAN, *supra* note 13, at 97. A recent case indicates that the Board may soon reverse its long-standing policy. In *United Dairy Farmers Coop. Ass'n*, 242 N.L.R.B. No. 179 (June 12, 1979), two members of the Board found that its remedial powers "may well encompass" the authority to issue a bargaining order despite lack of a majority showing, two others held that the Board *has* that authority, and a fifth member found no such authority. No bargaining order was issued in the case.

¹⁶ *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 306-07, 310 (1974).

The Court reserved the question whether an employer violates § 8(a)(5) if it breaches an agreement to have the union's majority status determined by some method other than a Board election. *Id.* 310 n.10. After *Linden Lumber*, however, one must question the validity of cases holding that an employer must bargain with the union if it determines for itself that the union enjoys a card majority, e.g., by an informal poll of its employees. See, e.g., *Sullivan Elec. Co. v. NLRB*, 479 F.2d 1270 (6th Cir. 1973). See note 30 *infra*. Even if the employer discovers that the cards were indeed signed, issues of the appropriateness of the unit and the manner of card solicitation still remain.

practice proceedings in these withdrawal of recognition cases as it has already done in the initial recognition context.¹⁷

According to the theory of the bargaining order remedy expressed in *Gissel* and *Linden Lumber*, the Board should issue a bargaining order only when employer unfair labor practices have exerted a coercive effect on the employees so that their desires cannot be accurately determined in a free election. The purpose of the bargaining order is to protect the employees' right to choose their bargaining representative freely.¹⁸ It follows that a bargaining order should issue only in favor of a union with an unclouded claim to majority support.¹⁹

What are the implications of this theory for the *Laura Modes* situation, when the union has been found guilty of serious acts of violent misconduct? When a union authorizes violence to achieve its goals, it coerces the employees as much as, if not more than, the employer does when it commits unfair labor practices such as discriminatorily discharging or interrogating employees, or threatening or promising economic loss or gain. Even when the union's violence is directed exclusively at the employer and occurs out of the presence of any employees, it must be considered as violative of the employees' representational rights if they are likely to learn of it, because the employees will not be slow to realize that the same techniques of "persuasion" can be turned on them should they differ with the union.²⁰

In the *Gissel* situation, only the employer has coerced the employees, and the inability to hold a valid election can be remedied by ordering the employer to bargain with the union that has previously supported its claim to majority status by a card showing. But in the *Laura Modes* scenario, the union has impliedly dissipated its own majority. The only way to do justice to the employees' right to choose their representative in an atmosphere free of coercion is

¹⁷ See *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493 (5th Cir. 1972). But see *NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970).

¹⁸ The *Gissel* bargaining order also serves a secondary purpose of deterring employer violations. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969). Such deterrence, however, is designed to protect employee rights in the long run, and the employees' long-range interest in deterrence should not be allowed to override their immediate interest in having their desires determined in a representation election where one is possible. See *id.* 615.

¹⁹ It is assumed here that the employer's violations are not so outrageous as to justify a bargaining order even without evidence of the union's preexisting majority support. See note 15 *supra*.

²⁰ *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 6-7 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

to withhold a bargaining order while the air clears and to conduct a valid representation election as soon as possible.

This analysis has not been followed by the Board in *Laura Modes* and subsequent cases, which more or less ignore the coercive effects of union violence on the employees' free choice²¹ and establish instead an unjustifiably stringent standard that few employers have been able to meet. As a result, unions guilty of serious and flagrant acts of violence and intimidation have wrongly enjoyed the benefit of the bargaining order remedy.

II. BARGAINING ORDERS WITHHELD

To understand how the Board perceives the *Laura Modes* defense, it is necessary to return to its origin in the *Laura Modes* case itself.²² All five of the employees in the bargaining unit authorized the union to represent them, and the employer learned this fact through direct interrogation. When the union made a bargaining request, the employer responded by asking for a day or two to consult with its attorney. After the union agreed to this delay, the employer met with the five employees, asked them to withdraw from the union, and stated its intention never to contact the union agent.

Immediately following the meeting one of the employees called the union, which sent a business agent and eight union members to the plant "to bolster their morale."²³ The group entered the plant and tried to talk to the employees. When one of the partners of the company attempted to call an attorney on the phone, one of the union men seized the phone and struck him in the face. A female office employee who then endeavored to call the police was also "pushed around."²⁴ The mauling of the partner continued until communication with the police was established, at which point the union people abruptly left the plant of their own volition.

The employer spoke to the employees again later in the day and threatened reprisals unless the men dropped the union, but they all declined to do so. When the employer continued to refuse

²¹ Administrative Law Judge Maloney, in a generally insightful opinion, observed: "Looked at analytically, the Board cases which deny bargaining orders because of union misconduct actually do not seem to address the problem of what effect the misconduct of all parties has had on the mind of the reasonable and prudent voter." *Donelson Packing Co.*, 220 N.L.R.B. 1043, 1060 (1975), *enforced mem.*, 569 F.2d 430 (6th Cir. 1978).

²² *Herbert Bernstein (Laura Modes Co.)*, 144 N.L.R.B. 1592 (1963).

²³ *Id.* 1593.

²⁴ *Id.*

to meet with union representatives for several days, the union filed charges with the Board and the employees voted to strike. Seven days after the strike commenced, a second partner was beaten by four unidentified men after being followed and pointed out by one of the striking employees, named Lewis. After this second incident, the employer filed an unfair labor practice charge against the union, claiming it had violated section 8(b)(1)(a)²⁵ of the Act by engaging in violent misconduct. Two months later, however, a settlement agreement was reached on the charge and the union thereafter refrained from any additional acts of violence.

The Board held that the employer had violated section 8(a)(1)²⁶ of the Act by coercing employees in their choice of bargaining representative and also section 8(a)(5) by refusing to recognize the union with the aim of undermining the union's majority status. The company was ordered to reinstate the striking employees with the exception of employee Lewis. Contrary to its normal practice in such cases, however, the Board declined to order the company to recognize and bargain with the union:

We do not, however, deem it appropriate to give the Charging Union the benefit of our normal affirmative bargaining order in the circumstances of this case. For we cannot, in good conscience, disregard the fact that, immediately before and immediately after it filed the instant charges, the Union evidenced a total disinterest in enforcing its representation rights through the peaceful legal process provided by the Act in that it resorted to and/or encouraged the use of violent tactics to compel their grant. Our powers to effectuate the statutory policy need not, we think, be exercised so single-mindedly in aiming for remedial restoration of the *status quo ante*, that we must disregard or sanction thereby union enforcement of an employer's mandatory bargaining duty by unprovoked and irresponsible physical assaults of the nature involved here. We recognize of course that the employees' right to choose the Union as their representative survives the Union's misconduct. But we believe it will not prejudice the employees unduly to ask that they demonstrate their desires

²⁵ 29 U.S.C. § 158(b)(1)(A) (1976). Section 8(b)(1)(A) reads in pertinent part: "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7" *Id.* The significant text of § 7 appears in note 10 *supra*.

²⁶ 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their § 7 rights. *Id.*

anew in an atmosphere free of any possible trace of coercion. . . . We conclude that, in the particular circumstances of this case, the policies of the Act and the legitimate interests of the public and the parties will best be served by denying to the Union the right to invoke our statutory processes in aid of a demand for recognition as bargaining representative of Respondents' employees unless and until it demonstrates its majority among those employees through the Board's election procedures.²⁷

The Board's holding in *Laura Modes* lends itself to a variety of interpretations, both as to its scope and rationale. Read expansively, it might be taken to mean that whenever a union engages in violent or coercive conduct, the remedy of a bargaining order is foreclosed. Construed narrowly, *Laura Modes* applies only to a situation in which a card majority union seeks by "unprovoked," "physical assaults" to coerce recognition by the employer.

A second problem of interpretation derives from the opinion's twin rationales. On the one hand, withholding the bargaining order is a matter of "conscience," a variant, it seems, of the ancient "unclean hands" doctrine of equity: by attempting to enforce its statutory rights through extra-statutory and violent methods, the union rendered itself unworthy of the Board's equitable intervention. On the other hand, the opinion suggests a representational rationale: a bargaining order was inappropriate because only the Board's certification election procedures could dispel "any possible trace of coercion" contributing to the union's card majority status. Relying almost exclusively in subsequent cases on the equity branch, the Board has not paid sufficient attention to the effects of union violence on the statutory rights of intimidated employees.

Unquestionably, the Board has given a narrow scope to *Laura Modes*, sustaining the defense in only two cases since 1963: *Joseph H. Bliss (Artcraft Mantel & Fireplace Co.)*²⁸ and *Allou Distributors, Inc.*²⁹

Artcraft Mantel, like *Laura Modes*, involved a card majority union striking for recognition. The employer's only violation of the Act was his refusal to recognize and bargain with the union, despite the lack of a good faith doubt as to the union's majority status.³⁰ Although no one was physically beaten, the trial ex-

²⁷ 144 N.L.R.B. at 1596.

²⁸ 174 N.L.R.B. 737 (1969).

²⁹ 201 N.L.R.B. 47 (1973).

³⁰ The employer in *Artcraft Mantel* was held not to have a good faith doubt of the union's representative status because he knew that a majority of his employees

aminer,³¹ whose findings and conclusions were upheld by the Board without modification, found abundant evidence of union involvement in an extended campaign of intimidation and property damage. Denying a bargaining order, the trial examiner emphasized the union's "failure to compel or seek recognition by following through on the normal procedures of Board action available . . . under the law."³²

In *Allou Distributors, Inc.*³³ the Board reversed the administrative law judge's decision to issue a bargaining order. The employer had violated sections 8(a)(1) and 8(a)(5) by initiating a decertification petition, by promising improved benefits if the employees would sign, and by subsequently refusing to bargain with the union upon termination of the existing contract. For its part, the union, when it learned of the move to decertify, sent six business agents to the plant to "persuade" the employees by means of force, threats, and intimidating conduct to withdraw the petition. Although the judge found the agents' behavior to be "an aggravated demonstration to the employees that they were in danger of suffering not only economic injury but also physical harm should they persist in their efforts to withdraw from the Union,"³⁴ he thought *Laura Modes* distinguishable because here the union, far from seeking initial recognition, had been the recognized, if uncertified, bargaining representative of the employees for a number of years.³⁵

Disagreeing with the judge's analysis, the Board panel described the union's behavior as "a deliberate plan of intimidation and violence in order to insure the employees' adherence to the Union," and found "this callous attempt to enforce its representation rights" to preclude a bargaining order remedy.³⁶

If there is a common thread running through *Laura Modes*, *Artcraft Mantel*, and *Allou*, it is that in each case the union engaged in a deliberate plan of violent misconduct with the aim of securing or maintaining representational status in defiance of the Board's established procedures. Although in every case the em-

were on strike. After *Linden Lumber Div., Summer & Co.*, 419 U.S. 301 (1974), in which the Supreme Court rejected the notion of a duty to bargain arising from evidence of a majority strike, the finding of a § 8(a)(5) violation on the facts of *Artcraft Mantel* is no longer good law.

³¹ The title of "trial examiner" was changed in 1972 to "administrative law judge." See 5 C.F.R. § 930.203a (1978).

³² 174 N.L.R.B. at 741.

³³ 201 N.L.R.B. 47 (1973).

³⁴ *Id.* 47.

³⁵ *Id.*

³⁶ *Id.* 48.

ployer violated its duty to bargain, in none of these three cases was that duty the result of certification following a Board-supervised election. According to this account of the Board's approach, union violence standing alone will not suffice to preclude a bargaining order; union violence deliberately employed to circumvent the Board's own procedures for enforcing representational rights is required. Examination of the numerous cases in which the Board has rejected the *Laura Modes* defense lends support to this interpretation.³⁷

III. BALANCING THE EQUITIES: THE BOARD'S CONTAINMENT OF *Laura Modes*

In the great majority of cases decided by the Board, employers raising the *Laura Modes* defense meet with frustration. Occasionally, the employers' claims rest on union "misconduct" too minimal for the Board to take seriously.³⁸ More often, however, the *Laura Modes* defense fails despite union violence of significant, if not shocking, proportions.³⁹

For deciding whether to issue or withhold a bargaining order in these cases, the Board has developed a balancing test that weighs the seriousness of the union's misconduct against the gravity of the employer's unfair labor practices.⁴⁰ Factors that weigh in the scales include:

³⁷ These three cases also shed light on the Board's opinion in *Union de Tronquistas, Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399 (1973). In that case the issue was whether the union should be held liable for back-pay damages to employees prevented from working by the union's misconduct. Reaffirming its long-standing policy of not granting monetary damages to employees coerced by union misconduct, the Board pointed to its practice of withholding bargaining orders as one of several existing remedies that it deemed adequate to the task of preventing union violence. *Id.* 399-400. Even assuming that withholding three bargaining orders in the space of many years can be conceived of as having any effect at all on union misconduct, the Board's remark appears especially obtuse when one considers that in none of those three cases was there any issue of backpay or lost work time.

³⁸ *Bruce Duncan Co.*, 233 N.L.R.B. No. 176 (Dec. 15, 1977), [1978] NLRB Dec. 31,286 (circumstantial linking of one or two flat tires to one union picketer is insubstantial against a request for a bargaining order); *Paramount Gen. Hosp., Inc.*, 223 N.L.R.B. 1017 (1976) (distribution of allegedly defamatory handbills too minimal to obviate need for bargaining order), *enforced mem.*, 554 F.2d 1202 (D.C. Cir. 1977). See note 51 *infra*.

³⁹ See, e.g., *Maywood Plant of Grede Plastics, Div. of Grede Foundries, Inc.*, 235 N.L.R.B. No. 40 (Mar. 24, 1978), [1978] NLRB Dec. 31,776; *Ramona's Mexican Food Prods., Inc.*, 203 N.L.R.B. 663 (1973), *enforced*, 531 F.2d 390 (9th Cir. 1975); *Quintree Distributions, Inc.*, 198 N.L.R.B. 390 (1972); *United Mineral & Chem. Corp.*, 155 N.L.R.B. 1390 (1965), *enforcement denied in relevant part*, 391 F.2d 829 (2d Cir. 1968).

⁴⁰ See *NLRB v. Triumph Curing Center*, 571 F.2d 462 (9th Cir. 1978); *Donovan v. NLRB*, 520 F.2d 1316 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

- 1) the scope and intent of the union misconduct,
- 2) whether the misconduct occurs on or away from the picket line, and
- 3) the existence of a section 8(b)(1)(A) settlement.⁴¹

If, unlike the situation in *Laura Modes*, the union recently has been certified pursuant to a valid Board election, the balance from the outset tips in the union's favor.⁴²

In any given case, several of these considerations are likely to be present and to influence the outcome, and isolation of a single factor for the purpose of analysis does violence to the integrity of the opinion. With this caveat, the following examination of each of the above factors can still offer valuable insights into the general trends of the Board's handling of the *Laura Modes* defense.⁴³

A. Scope and Intent of Union Misconduct

In weighing the evidence of union violence the Board has returned repeatedly to language first enunciated in *Laura Modes*,

⁴¹ When balancing the employer's offenses against the union's misconduct, the Board has occasionally remarked that it was the employer's unfair labor practices which provoked the union in the first place. Maywood Plant of Grede Plastics, Div. of Grede Foundries, Inc., 235 N.L.R.B. No. 40 (Mar. 24, 1978), [1978] NLRB Dec. 31,776; General Iron Corp., 224 N.L.R.B. 1180, 1194 (1976); Queen Mary Restaurants Corp., 219 N.L.R.B. 776, 798 (1975), *enforced*, 560 F.2d 403 (9th Cir. 1977); Ramona's Mexican Food Prods., Inc., 203 N.L.R.B. 663, 685 (1973), *enforced*, 531 F.2d 390 (9th Cir. 1975); Cascade Corp., 192 N.L.R.B. 533, 536 (1971), *enforcement denied on other grounds per curiam*, 466 F.2d 748 (6th Cir. 1972). See Dow Chem. Co., 216 N.L.R.B. 82, 87 (1975). Cf. N.L.R.B. v. Thayer Co., 213 F.2d 748, 770 (1st Cir.) (reinstatement of strikers guilty of misconduct), *cert. denied*, 348 U.S. 883 (1954). Employer provocation might thus be considered as a fourth factor in the Board's analysis of *Laura Modes* contentions. With a few exceptions, however, see, e.g., *Grede Plastics*, *supra*, "provocation" as used by the Board in these cases means no more than that the employer's violations are the "but for" cause of the union's misconduct. In any case in which the *Laura Modes* defense is properly raised the union's misconduct follows upon the employer's refusal to bargain. Characterizing the employer's offense as a "provocation," therefore, does not further the task of balancing, but merely defines the *Laura Modes* situation in terminology unnecessarily laden with emotion. For criticism of a similar "provocation" analysis in the context of reinstatement cases, see Stewart & Townsend, *Strike Violence: The Need for Federal Injunctions*, 114 U. PA. L. REV. 459, 475 (1966).

⁴² Although no certified union has yet been the victim of a successful *Laura Modes* defense, in reported cases decided by the Board, the Board has never articulated certification as an absolute bar to the *Laura Modes* defense. See note 65 *infra* and text accompanying notes 60-64 *infra*.

⁴³ Problems of proof constitute another hurdle for employers raising a *Laura Modes* defense. Union misconduct must consist of acts of the union or its agents, or acts for which the union can be held responsible. See R. GORMAN, *supra* note 13, at 218-19. In a case in which no evidence identifies the perpetrators of misdeeds, or in which striking employees are identified, but no evidence links their acts to the union or its agents, the *Laura Modes* defense will fail. John Dory Boat Works, Inc., 229 N.L.R.B. 844, 854 n.28 (1977); C.A. Froedge Delivery & Trucking Servs., Inc.,

which characterized the issue as whether the union's conduct demonstrates "a total disinterest in enforcing its representation rights through the peaceful legal process provided by the Act."⁴⁴ As it was in *Laura Modes*, such a determination is necessarily inferential, because unions are understandably reluctant to admit a total disinterest in the Board's processes.

What constitutes the requisite "total disinterest"? The two criteria most commonly relied on are the pervasiveness and the deliberate or planned nature of the union's violent misconduct.⁴⁵ With standards as nebulous as these, no sure rules of thumb have emerged. Thus, the employer's invocation of *Laura Modes* was rejected in *Pacific Abrasive Supply Corp.*⁴⁶ because the union misconduct consisted of only one incident. Yet in *Allou Distributors, Inc.*,⁴⁷ a single incident sufficed to forfeit the union's bargaining order, perhaps because, although not pervasive, the conduct in question presented irrefutable evidence of a deliberate plan to terrorize employees into withdrawing their support from a decertification petition.⁴⁸

At the other extreme, five instances of serious misconduct, which included several beatings and resulted in the extended hospitalization of one elderly victim, were found by the Board not to be part of a plan of intimidation, despite a contrary holding by the trial examiner.⁴⁹ In that case, the Board relied on evidence that the union zealously sought to enforce its statutory rights through the Board's procedures to rebut the inference of "total disinterest" contained in the trial examiner's opinion.⁵⁰

The Board's criteria of pervasiveness and deliberate or planned violence, although they give some content to the test of whether

172 N.L.R.B. 46, 56 & n.41 (1968); *Call, Burnup, & Sims, Inc.*, 159 N.L.R.B. 1661 (1966), *enforced*, 393 F.2d 412 (1st Cir. 1968). See *Donelson Packing Co.*, 220 N.L.R.B. 1043 (1975), *enforced mem.*, 569 F.2d 430 (6th Cir. 1978).

⁴⁴ *Laura Modes Co.*, 144 N.L.R.B. 1592, 1596 (1963). See, e.g., *Great Chinese Am. Sewing Co.*, 227 N.L.R.B. 1670, 1671 n.6 (1977), *enforced*, 578 F.2d 251 (9th Cir. 1978); *Pacific Abrasive Supply Co.*, 182 N.L.R.B. 329, 331 (1970).

⁴⁵ *Independent Ass'n of Steel Fabricators, Inc.*, 231 N.L.R.B. 264, 288 (1977), *enforced in part*, 582 F.2d 135 (2d Cir. 1978); *Great Chinese Am. Sewing Co.*, 227 N.L.R.B. 1670, 1671 n.6 (1977), *enforced*, 578 F.2d 251 (9th Cir. 1978); *Pacific Abrasive Supply Co.*, 182 N.L.R.B. 329, 331 (1970); *United Mineral & Chem. Corp.*, 155 N.L.R.B. 1390, 1396 (1965), *enforcement denied in relevant part*, 391 F.2d 829 (2d Cir. 1968).

⁴⁶ 182 N.L.R.B. 329, 340 (1970).

⁴⁷ 201 N.L.R.B. 47 (1973).

⁴⁸ See text accompanying notes 33-36 *supra*.

⁴⁹ *United Mineral & Chem. Corp.*, 155 N.L.R.B. 1390, 1396 (1965), *enforcement denied in relevant part*, 391 F.2d 829 (2d Cir. 1968).

⁵⁰ *Id.*

the union has demonstrated a total disinterest in the Board's peaceful, legal processes, do not provide a predictable measure of the scope or intent of union violence necessary to raise successfully the *Laura Modes* defense.⁵¹ Even when union misconduct is pervasive, it appears that a union can save itself by simultaneously pursuing its rights through the Board's procedures.

B. Picket Line Distinction

When union misconduct occurs on the picket line, the Board tends to discount it.⁵² Although this policy purports to be founded in the statutory purpose,⁵³ it is difficult to believe that Congress could ever bring itself to condone the results yielded by the policy as applied by the Board in the *Laura Modes* cases.

In *Quintree Distributors, Inc.*,⁵⁴ for example, the union was found guilty of interfering with the movement of the employer's

⁵¹ A creative approach to the *Laura Modes* defense was taken, albeit unsuccessfully, by an employer in the recent case of *L'eggs Prods., Inc.*, 236 N.L.R.B. No. 43 (May 25, 1978), [1978] NLRB Dec. 32,270. Although no evidence of any violence was involved, a union agent interfered with the job performance of an employee whose testimony at an unfair labor practice proceeding had aroused the agent's ire. Noting the General Counsel's objection that the *Laura Modes* defense applies only to violent union misconduct, the administrative law judge nevertheless saw an analogy in that the agent's retaliatory conduct tended to subvert the Board's procedures. The employer's ingenious attempt came to nought, however, because the judge found the incident to be a lone instance and not part of a plan of intimidation. Significantly, the judge did not hold *Laura Modes* inapplicable to non-violent union conduct. *Id.*, slip op. at 136-38.

⁵² *Quintree Distribs., Inc.*, 198 N.L.R.B. 390 (1972); *Dow Chem. Co.*, 216 N.L.R.B. 82, 82 n.1 (1975); *United Mineral & Chem. Corp.*, 155 N.L.R.B. 1390 (1965), *enforcement denied in relevant part*, 391 F.2d 829 (2d Cir. 1968). See *Maywood Plant of Grede Plastics, Div. of Grede Foundries, Inc.*, 235 N.L.R.B. No. 40 (Mar. 24, 1978), [1978] NLRB Dec. 31,776 (Murphy, Member, dissenting in part).

⁵³ From the earliest days of collective bargaining under the Act, a certain amount of picket line violence has been viewed as inevitable:

We think it must be conceded, however, that some disorder is unfortunately quite usual in an extensive or long drawn out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regulated, must have been in the contemplation of the Congress when it provided in Sec. 13 of the Act, 29 U.S.C.A. § 163, that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the Act would be indeed illusory.

Republic Steel Corp. v. NLRB, 107 F.2d 472, 479 (3d Cir. 1939), *modified on other grounds*, 311 U.S. 7 (1940).

⁵⁴ 198 N.L.R.B. 390 (1972).

trucks, threatening and inflicting injury on non-striking employees, threatening to run non-striking drivers off the road, throwing beer cans on truck windshields and into truck cabs, sometimes hitting the drivers, spraying beer on windshields, letting air out of tires, cutting air hoses on trucks, putting pebbles in gas tanks, throwing stones on the employer's premises, causing breakage to cases of the employer's beer, and using "scab" and other four-letter words in relation to working employees.⁵⁵ Nevertheless, the administrative law judge, whose recommendation was adopted by the Board, refused to withhold a bargaining order and excused the union's misconduct as taking place in "the heat of picket line tensions."⁵⁶

Although a minimal amount of picket line violence and intimidation probably is an inevitable concomitant of labor disputes, the picket line distinction should not be allowed to obscure the possibility that the union is cold-bloodedly using the "heat of picket line tensions" shield to mount a calculated campaign of intimidation and harassment.

C. Section 8(b)(1)(A) Settlement Agreements

In *Laura Modes*, the Board withheld its customary bargaining order despite the fact that the union misconduct led to section 8(b)(1)(A) charges and a settlement agreement which the union observed faithfully.⁵⁷ In subsequent cases, however, the Board has relied on the existence of a section 8(b)(1)(A) settlement agreement as favoring the issuance of a bargaining order.⁵⁸

The Board's theory appears to be that a settlement agreement is a sufficient remedy for the union's misbehavior, inasmuch as it constitutes a "firm and enforceable commitment" that "future union misconduct will not occur."⁵⁹ It is not at all clear, however, why the union's promise under threat of prosecution to discontinue its illegal conduct in the future should affect the judgment whether it demonstrated a total disinterest in the Board's procedures in the past.

⁵⁵ *Id.* 403 & nn.28 & 30.

⁵⁶ *Id.* 405.

⁵⁷ Herbert Bernstein (*Laura Modes Co.*), 144 N.L.R.B. 1592, 1594 (1963).

⁵⁸ See, e.g., Jimmy Dean Meat Co., 227 N.L.R.B. 1012, 1040 (1977); Donelson Packing Co., 220 N.L.R.B. 1043, 1063 (1975), *enforced mem.*, 569 F.2d 430 (6th Cir. 1978); Cascade Corp., 192 N.L.R.B. 533 (1971), *enforcement denied on other grounds per curiam*, 466 F.2d 748 (6th Cir. 1972).

⁵⁹ Cascade Corp., 192 N.L.R.B. 533, 533 n.2 (1971), *enforcement denied on other grounds per curiam*, 466 F.2d 748 (6th Cir. 1972).

D. *The Significance of Certification*

The Board has never in any reported case withheld a bargaining order from a union duly certified as the employees' bargaining representative. In a common scenario, the union petitions for a representation election, obtains a majority vote in a valid election, and wins certification by the Board. The employer refuses to recognize the union or bargain, and the union strikes. During the strike, violence attributable to the union occurs. In the ensuing unfair labor practice proceeding, the Board finds the employer guilty of a section 8(a)(5) offense, and the employer objects to a bargaining order remedy on the authority of *Laura Modes*.⁶⁰

Both the equity and the representational rationale of *Laura Modes* combine in this fact situation to create a very strong presumption against the employer's attempted defense. The employer cannot effectively argue that the union's violence has thrown its majority into doubt, because the Board enforces, with Supreme Court approval,⁶¹ a one year bar following certification against all challenges to the certified union's majority status.⁶² Neither can the union's entitlement to a bargaining order be questioned under the dominant branch of the *Laura Modes* rationale, which applies to union misconduct evincing a total disinterest in utilizing the Board's peaceful legal processes. Here the union has complied with the Board's strict election conduct rules and emerged the victor in a valid election contest.

This barrier, although great, is not insurmountable. In *Union Nacional de Trabajadores*,⁶³ a union that attempted to enforce its recent election victory by extreme brutality saw its certification revoked by the Board within the certification year. There the union's violence was held to terminate the employer's duty to bargain, and the Board, citing *Laura Modes*, denied the union access to its remedial processes until it could demonstrate its majority status in a second election.

⁶⁰ See, e.g., *Quintree Distribs., Inc.*, 198 N.L.R.B. 390 (1972); *Cascade Corp.*, 192 N.L.R.B. 533 (1971), *enforcement denied on other grounds per curiam*, 466 F.2d 748 (6th Cir. 1972).

⁶¹ *Brooks v. NLRB*, 348 U.S. 96 (1954).

⁶² Exceptions to the certification year bar recognized by the Board include dissolution or defunctness of the certified union, schism (in which the majority of the employees in the bargaining unit transfer their affiliation to another union), and radical fluctuations within a short time in the size of the bargaining unit. *Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954).

⁶³ 219 N.L.R.B. 862 (1975), *enforced as modified*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

Following the certification year, an employer can refuse to bargain or petition for an election if it can establish a good faith doubt as to the union's majority.⁶⁴ In this context, whether a union enjoys official certification by the Board or informal recognition by the employer ordinarily makes no difference in the adjudication of section 8(a)(5) charges and should not affect the analysis of a *Laura Modes* defense.

IV. APPELLATE REVIEW OF *Laura Modes* CASES

Although none of the *Laura Modes* cases withholding bargaining orders have been subjected to appellate review,⁶⁵ cases in which the Board rejected the *Laura Modes* defense and issued a bargaining order have received a mixed reception in the courts of appeals.

In two early opinions, Judge Friendly foreshadowed the analysis of *Laura Modes* contentions advanced in this Comment. In *NLRB v. United Mineral & Chemical Corp.*,⁶⁶ Judge Friendly's opinion for the court denied enforcement of the Board's bargaining order, asserting several grounds for its decision. In that case, the Board refused to adopt the administrative law judge's recommendation that a bargaining order should not issue due to the gravity of the union's violent misconduct. The court, reviewing the evidence, first disagreed with the Board's understated account of the union's misbehavior, finding it to be "part of a plan of intimidation."⁶⁷ Second, the court recognized that in reinstatement contexts involving strikers guilty of misconduct, the Board was required to balance the seriousness of the employer's unfair labor practice against the employee's misconduct, but questioned whether, if that test were applicable in the case before it, the union's violence did not outweigh the less flagrant violations of the employer. Finally, Judge Friendly doubted that a balancing test, however appropriate in the reinstatement context in which the choice is between reinstating or

⁶⁴ See text accompanying note 17 *supra*.

⁶⁵ The Court of Appeals for the First Circuit granted enforcement of the Board's orders in *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977), a case involving closely related issues of union violence. In that case, the Board found no § 8(a)(5) violation by the employer, whose duty to bargain was terminated by the union's violent bargaining tactics, and took the extraordinary step of revoking the union's certification. Thus, the propriety of a bargaining order was not an issue on appeal. Although the court found it lacked jurisdiction to review the Board's revocation of certification, it felt obliged to express reservations concerning the Board's choice of remedy and noted that the "normal remedial measure would be to refuse to enter a bargaining order on behalf of the union." *Id.* 13.

⁶⁶ 391 F.2d 829 (2d Cir. 1968).

⁶⁷ *Id.* 840.

not reinstating the employee, was desirable in the bargaining order situation, when a third and preferable alternative of conducting an election is usually available: "It is exceedingly hard to believe that Congress meant to authorize the Board to require bargaining with a union having a bare card-count majority which has attempted to increase this or to enforce its claim to representation by hitting other employees or the employer on the head."⁶⁸ The court, however, left open the possibility that severe union violence might be disregarded if unfair labor practices by the employer precluded the holding of a fair election.⁶⁹

In a later opinion denying enforcement of a bargaining order on the grounds that the employer's violations were not so serious as to render a fair election impossible, Judge Friendly went on to observe that even if the employer's violations sufficed to justify a bargaining order, the order would have to be withheld because the union's misconduct intimidated the employees and eliminated the chance of a fair election before the employer's violations ever took place.⁷⁰

The skepticism about the Board's balancing test and the corresponding concern for the coercive effects of union violence on the employees' free choice expressed in these two cases have been modified but not eliminated in subsequent cases decided by the Court of Appeals for the Second Circuit. In *Donovan v. NLRB*,⁷¹ another case in which an administrative law judge refused to issue a bargaining order but was reversed by the Board, the court enforced the Board's order, endorsed the Board's balancing test, and sounded a note of extreme deference to the Board's "broad remedial authority."⁷² Emphasizing the Board's expertise in remedial matters, the court once again deferred to the Board's judgment in *NLRB v. Independent Association of Steel Fabricators, Inc.*,⁷³ but significantly chose not to enforce the Board's bargaining order and left it to the Board's discretion to reconsider whether an election would be a more appropriate sanction than an order to bargain.⁷⁴

Relying on the authority of *Donovan*, a divided panel of the Court of Appeals for the Ninth Circuit enforced the Board's bar-

⁶⁸ *Id.* 841.

⁶⁹ *Id.*

⁷⁰ *NLRB v. World Carpets, Inc.*, 463 F.2d 57, 62 (2d Cir. 1972).

⁷¹ 520 F.2d 1316 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

⁷² *Id.* 1323.

⁷³ 582 F.2d 135 (2d Cir. 1978).

⁷⁴ *Id.* 151-52.

gaining order in *NLRB v. Triumph Curing Center*.⁷⁵ The court concurred in the Board's balancing of the equities approach and concluded that denial of a bargaining order would be appropriate only if the employer was less guilty of engendering a coercive atmosphere than the union.⁷⁶

Judge Hufstedler's carefully reasoned opinion, dissenting from the majority's enforcement of the Board's remedy, deserves close attention. She criticized the Board's approach to denying bargaining orders as "primarily a punitive measure designed to deter the union from future misconduct" ⁷⁷ and an inducement to the union to rely on the Board's legal procedures instead of "resorting to violent self-help," ⁷⁸ and focused on the role of the *Laura Modes* defense in vindicating employee rights. Because violence "can inject an element of coercion and intimidation into the relationship between a union and its members which is incompatible with the principle of employee free choice," ⁷⁹ Judge Hufstedler asserted that issuance of a bargaining order in favor of a union guilty of serious misconduct runs counter to the basic policy of the Act.

Reexamining the *Laura Modes* case, Judge Hufstedler stressed the representational strand in the Board's rationale and concluded that "a *prima facie* showing of employee intimidation is made upon proof that the union committed serious acts of violence." ⁸⁰ Unless the union demonstrates that the coercive effects of its misbehavior have dissipated, it is no longer entitled to consideration as the employees' freely chosen bargaining representative.

Focus on the effect of union violence on the statutory rights of the employees led Judge Hufstedler to reject the Board's balancing test. Unlike equitable considerations, which can be balanced, the coercive effects of multiple employer and union violations are cumulative. The test for withholding a bargaining order, therefore, should not involve a determination of whose misconduct was more serious; rather it necessitates an inquiry whether the union's violence was sufficiently grave to introduce a coercive element into the union's representational relationship with the employees.⁸¹

⁷⁵ 571 F.2d 462 (9th Cir. 1978).

⁷⁶ *Id.* 476.

⁷⁷ *Id.* 478 (Hufstedler, J., concurring in part and dissenting in part).

⁷⁸ *Id.*

⁷⁹ *Id.* 479.

⁸⁰ *Id.*

⁸¹ *Id.* 480. Judge Hufstedler would have remanded to the Board for specific findings on the extent of the union misconduct and its effect on the employees and suggested that an election could be held in lieu of a bargaining order if further investigation by the Board proved too difficult or expensive. *Id.* 480 & n.2.

V. TOWARD A NEW APPROACH TO *Laura Modes*

The preceding examination of cases decided by the Board and the courts establishes that the equity rationale for the *Laura Modes* defense reigns triumphant. The result is a stringent standard which only the most egregious cases can overcome. Judge Hufstedler's piercing dissent in *Triumph Curing Center*,⁸² however, goes a long way towards rehabilitating the neglected representational theory implicit in the Board's opinion in *Laura Modes*.

The cornerstone of the American system of labor collective bargaining is the right of employees to choose their majority representatives freely. The legal machinery established by the Act and administered by the Board exists in order to protect and enforce those rights of representation. When a union bypasses the Board's peaceful processes and resorts to violence and intimidation to enforce its claims upon the employer, the employees' representational freedom is placed in double jeopardy. In the primary sense, union violence coerces and restrains employees in the exercise of their rights under the Act. Derivatively, union misconduct threatens the whole structure of the administrative process that gives meaning and content to those rights. The prevailing approach to the *Laura Modes* doctrine, which emphasizes respect for the Board's procedures, serves only to protect employee rights in the derivative sense and ignores the fundamental and much more obvious threat to the free choice of the frightened employee.

The truthfulness of the union's claims does not mitigate the coercive effect of union misconduct on the employee. Fear and intimidation leave him no room for thoughtful evaluation of the employer's and the union's respective positions. Moreover, the Board recognizes that the employer's unfair labor practices do not cancel out the union's misconduct, but rather compound and aggravate its intimidating effect.⁸³ Judge Hufstedler correctly observed that from the perspective of the rights of the employees balancing is beside the point.⁸⁴ The equities of the employer's and the union's violations can only be weighed after employee rights are removed from the scales. But to exclude the employees from this calculus is to lose sight of the purpose of the bargaining order

⁸² 571 F.2d 462 (9th Cir. 1978).

⁸³ Maywood Plant of Grede Plastics, Div. of Grede Foundries, Inc., 235 N.L.R.B. No. 40, slip op. at 8 (Mar. 24, 1978), [1978] NLRB Dec. 31,776, 31,779; Donelson Packing Co., 220 N.L.R.B. 1043, 1060 (1975), *enforced mem.*, 569 F.2d 430 (6th Cir. 1978).

⁸⁴ NLRB v. *Triumph Curing Center*, 571 F.2d 462, 480 (9th Cir. 1978) (Hufstedler, J., concurring in part and dissenting in part).

remedy, which is designed not to reward or punish the union, but primarily to give effect to the right of the employees to bargain collectively through the representative of their choice.

In any case in which union violence is raised as an objection to a bargaining order remedy, the first inquiry must be the extent to which the union's misconduct coerced or restrained employees in the exercise of their rights under the Act. If the coercion is serious enough under the circumstances to create doubt about the employees' continued support of the union as their bargaining representative, then a bargaining order should not issue.

A. Reexamining the Board's Criteria

From this new perspective the Board's traditional criteria—the scope and intent of the union's misconduct,⁸⁵ the location of the misconduct on or away from the picket line,⁸⁶ the existence of a section 8(b)(1)(A) settlement agreement,⁸⁷ and the significance of certification⁸⁸—must all submit to reexamination.

That union violence is pervasive and deliberate will remain significant under the new test, not because those characteristics demonstrate a "total disinterest" in enforcing rights through the Board's peaceful legal processes, but rather because violence that is either pervasive, deliberate, or both, will undoubtedly operate to coerce and intimidate the employees. Focusing on the employees in this way will eliminate the necessity under the Board's existing approach to delve into the subjective intent of the union in order to determine whether the union's acts rise to the level of a plan or policy of intimidation. Under the new approach, collateral evidence that the union did in fact pursue its rights through the Board's established procedures will no longer let the union off the hook, unless those lawful efforts can be shown to have mollified the coercive effects of the union's violence on the employees. Most importantly, the new emphasis on the free choice of the employees significantly lowers the barrier to making out a successful *Laura Modes* defense; plainly, union misconduct need not approach "pervasive, planned violence"⁸⁹ to coerce employees significantly and to render suspect the union's representative status.

⁸⁵ See text accompanying notes 44-51 *supra*.

⁸⁶ See text accompanying notes 52-56 *supra*.

⁸⁷ See text accompanying notes 57-59 *supra*.

⁸⁸ See text accompanying notes 60-64 *supra*.

⁸⁹ Independent Ass'n of Steel Fabricators, Inc., 231 N.L.R.B. 264, 288 (1977), enforced in part, 582 F.2d 135 (2d Cir. 1978).

The picket line distinction retains meaning under the new approach to *Laura Modes* only insofar as employees survive the minor scuffles and name calling of the picket line without being coerced or intimidated to any significant extent. It makes little sense, however, to consider an assault at the picket line to be less intimidating than one of exactly the same nature occurring thirty feet away inside the walls of the plant. The Board's mechanical use of the picket line distinction to excuse serious union violence in wholesale fashion cannot be countenanced once attention focuses on the representational rights of employees.

The existence of a section 8(b)(1)(A) settlement agreement provides institutional assurances that the union will refrain from further poisoning the atmosphere, but it is doubtful that it helps very much to erase coercive effects already created by union misconduct or to reassure the individual employee that he may act freely without fear of union reprisals in the future. Although somewhat relevant to the Board's current approach, with its concern that the union demonstrate respect for the Board's procedures, a settlement agreement should not count in a union's favor under the new test because it is largely irrelevant as a remedy for preexisting employee intimidation.

If the union is certified and its misconduct occurs within the certification year, the new approach to withholding bargaining orders runs counter to the Board's policy against questioning the union's majority status during the certification year. The certification year bar, however, should not be conceived as a union license to terrorize employees.⁹⁰ If the union's misconduct reaches the extremes portrayed in *Union Nacional de Trabajadores*,⁹¹ the Board will revoke the union's certification. A less extreme remedy, for less extreme misconduct, would be to treat egregious union violence as yet another exception to the certification year bar, and to deny bargaining orders to guilty unions even though they have recently been certified pursuant to an election conducted by the Board. Such a remedy would accord fully with the policy of stability in collective bargaining relationships that underlies the bar,⁹² because a union that resorts to serious violence to enforce its aims is an

⁹⁰ See *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 13 n.11 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

⁹¹ *Union Nacional de Trabajadores*, 219 N.L.R.B. 862 (1975), *enforced as modified*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

⁹² See R. GORMAN, *supra* note 13, at 52.

unlikely candidate for establishing a stable and harmonious relationship with the employer.⁹³

Once the certification year has passed, no special sanctity attaches to a union's certification so that informally recognized and officially certified unions deserve equal treatment under the new test.

B. *Measuring the Coercive Effects of Union Misconduct*

By what standard should the Board measure the coercive effects of union misconduct? In the *Gissel* initial recognition context, a bargaining order is appropriate if the employer's unfair labor practices have rendered a fair election unlikely and the union has demonstrated a prior card majority.⁹⁴ Under *Gissel*, the issuance of a bargaining order represents a judgment that, even though authorization cards are a less reliable means of ascertaining employee free choice than an election, they are sufficiently indicative of the employees' desires to support a bargaining order if the alternative of an election has been foreclosed due to the employer's violations. When the *Laura Modes* question arises in this context, the appropriateness of a *Gissel* bargaining order has already been decided, and the only issue is whether that remedy should be withheld because of the union's misconduct. The standard here ought, therefore, to be whether the union's misconduct has so coerced or intimidated the employees that the union's prior card majority has become too unreliable an indicator of the employees' free choice to support the weighty sanction of a bargaining order.

Such a standard is obviously a less stringent one than would be supplied by simply transposing the *Gissel* test and deciding whether the union's conduct, standing alone, renders a fair election improbable. Because cards are inherently untrustworthy indicators of employee support for the union, a small amount of union coercion will go a long way to erode confidence in their continuing reliability.

When the employer's refusal to bargain and the certified union's misconduct occur during the certification year, the Board should create another exception to the certification year bar for egregious union misconduct. For union violence that is less than egregious but still serious, the Board should apply a standard more tolerant of union violence because a recently certified union is entitled to a presumption of majority support.

⁹³ See Herbert Bernstein (*Laura Modes Co.*), 144 N.L.R.B. 1592, 1595 (1963).

⁹⁴ NLRB v. *Gissel Packing Co.*, 395 U.S. 575, 602 (1969). See note 15 *supra*.

If an employer raises the *Laura Modes* defense to defeat a bargaining order in favor of an incumbent union, the standard the Board should apply depends on the resolution of a preliminary issue. The Board and the majority of the circuit courts currently afford a stronger presumption of majority support to an incumbent union than to a card majority union seeking initial recognition,⁹⁵ despite the contrary implications of *Gissel* and *Linden Lumber*. If this view were applied in the *Laura Modes* context, a stronger showing of union coercion would be required to justify denial of a bargaining order when the union had enjoyed a bargaining relationship in the past, than when a card majority union sought initial recognition. Even if the majority view is accepted in ordinary cases in which no union misconduct issue arises, that view is ill-suited to the *Laura Modes* situation. The prevailing view justifies the stronger presumption for incumbent unions by appealing to the value of stability of established collective bargaining relationships.⁹⁶ But union violence, because it is inherently destructive of stable labor relations, negates that rationale and leaves only the value of protecting the employees' free choice to be considered. Thus, in the context of an incumbent union as well as in the context of initial recognition, the Board should apply the same standard in measuring the coercive effects of union violence.⁹⁷

C. *Rebutting the Inference of Coercion*

Under the new approach to *Laura Modes* defenses proposed here, the union will have the opportunity to show that the coercive effects of its misconduct have been dissipated. For example, if those responsible for the violence are disciplined, or thrown out of office, or if other evidence of free and uncoerced support of the union is established, the union may be able to rebut the inferences that would otherwise be drawn from its misconduct. It may also be possible for the union to show that its misbehavior did not intimidate the employees in the first place. Such a showing can be imagined in a situation involving a small bargaining unit, where

⁹⁵ See R. GORMAN, *supra* note 13, at 114-16.

⁹⁶ See *NLRB v. Frick Co.*, 423 F.2d 1327, 1330 n.6 (3d Cir. 1970).

⁹⁷ On this point, Judge Hufstедler is in agreement: "The potential for employee intimidation from union directed violence is every bit as great whether, as here, the union's representative status had been determined before the violence occurred or whether . . . the violence was a concomitant of a representation struggle." *NLRB v. Triumph Curing Center*, 571 F.2d 462, 479 (9th Cir. 1978) (Hufstедler, J., concurring in part and dissenting in part).

all the employees willingly participate in violent acts directed exclusively at the employer.

In either of these cases when protection of the employees' free choice does not require denial of a bargaining order, a bargaining order should still be withheld if the equities balance in favor of the employer. Proper emphasis on the safeguarding of employee rights does not entirely displace the Board's current approach or its emphasis on the peaceful, legal resolution of labor disputes through established procedures, but merely consigns it to a secondary or back-up position.

D. Justifying the Election Remedy

The solution of withholding a bargaining order and requiring the union to demonstrate its majority support in an election may strike some observers as paradoxical. The employer's violations, after all, have rendered a fair election unlikely, and the additional misconduct of the union has only made matters worse. To hold an election under these circumstances seems rather like cutting off one's nose to spite one's face.

The paradox disappears, however, if the election is not held until a time when the coercive effects of both the employer's and the union's misconduct have worn off, and a free and fair election becomes possible.⁹⁸ In the interim, collective bargaining between the parties falls into a state of suspended animation. This state of affairs concededly deprives the employees of their representational rights, but the quandary is one brought about by the employees' selected representative. Moreover, the employees' loss is merely temporary and enforces a policy that in the long run protects employee rights. The alternative of disregarding the union's violence and issuing a bargaining order would doubly disserve the employees' interests, first by saddling them with a representative of dubious majority status, and second, by destroying a strong disincentive to union-sponsored intimidation of employees. On balance, the remedy of a delayed election best accords with the policy of guaranteeing to employees their free choice of bargaining representative.

⁹⁸ See *Allou Distribs., Inc.*, 201 N.L.R.B. 47, 48 (1973); *Joseph H. Bliss (Artcraft Mantel & Fireplace Co.)*, 174 N.L.R.B. 737, 744 (1969); *Herbert Bernstein (Laura Modes Co.)*, 144 N.L.R.B. 1592, 1596 (1963). Cf. *Union Nacional de Trabajadores*, 219 N.L.R.B. 862, 864 (1975) (certification revoked until union can demonstrate majority in election untainted by coercive atmosphere) *enforced as modified*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

VI. CONCLUSION

Sixteen years ago in *Laura Modes Co.*,⁹⁹ the National Labor Relations Board inaugurated a policy of withholding its customary bargaining order remedy for employer refusals to bargain when the union seeking relief has engaged in serious acts of violence. Although not lacking in opportunities, the Board has seen fit to withhold bargaining orders in only two cases since *Laura Modes*, under a balancing test that requires union misconduct to evince a "total disinterest" in legal procedures, discounts picket line violence and counts the existence of a section 8(b)(1)(A) settlement agreement and certification status in the union's favor.

The Board's balancing approach to *Laura Modes* defenses has received mixed reviews in the courts of appeals and has been subjected to penetrating criticism for its lack of concern with the coercive effects of union violence on the fundamental right of employees to choose their collective bargaining representative freely.

This Comment has proposed a new approach to withholding bargaining orders because of violent union misconduct. Instead of weighing the employer's violations against the union's to determine which are more serious, the Board should focus on the coercive effects of union misconduct on the free choice of employees. If the coercion is serious enough to cast doubt on the employees' continued support of the union, then a bargaining order should not issue and the employer should be relieved of its duty to bargain with the union until the latter demonstrates its majority status in a Board-conducted election. This new approach significantly lowers the threshold of union misconduct necessary to make out a successful *Laura Modes* defense. The location of union misconduct on the picket line or the existence of a section 8(b)(1)(A) settlement agreement are relevant to this inquiry only to the extent that they bear on the coercive effects of the union's violence on the employees.

In initial recognition contexts, the Board's standard should be whether the union's misconduct has rendered the union's card majority too suspect to sustain the burden of a bargaining order. If the union is certified and the dispute occurs during the certification year, the Board should create another exception to the certification year bar for cases involving egregious union misconduct; otherwise, a recently certified union is entitled to a presumption of employee support. For certified unions beyond the certification year and informally recognized unions, the Board should apply the same standard as in the initial recognition context.

⁹⁹ Herbert Bernstein (*Laura Modes Co.*), 144 N.L.R.B. 1592 (1963).

To rebut the inference of loss of majority support the union may present evidence showing that the coercive effects of its misconduct have been dissipated or never existed in the first place. If the union successfully negotiates this hurdle, it must still prevail under the Board's balancing test, which now constitutes the second step in the scrutiny of union misconduct.

The proposed approach to denying bargaining orders envisions that an election will not be held until the coercive atmosphere has cleared, making possible a fair test of employee sentiment. This remedy, in contrast to a bargaining order, prevents the imposition of an unwanted union on the employees, while at the same time creating a strong disincentive to union violence. A revival of the *Laura Modes* doctrine along these lines will nurture the national labor policy ideal of collective bargaining that is both democratic and peaceful.